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THE ETHICS OF INVALID AND “IFFY” CONTRACT CLAUSES

*Christina L. Kunz**

This Symposium focuses on the extent to which attorneys can use agreed terms to supplant or “bump” the provisions of the Uniform Commercial Code (UCC). The articles in this Symposium demonstrate that the degree to which attorneys customarily “contract out”¹ varies considerably from UCC article to article. In reality, though, the issues surrounding contracting out of UCC provisions are not limited to the UCC, statutes, or other codified rules. The same issues arise whenever an attorney

- discerns whether a rule of law is a mandatory or default provision;
- drafts a clause on the edge of validity to try to gain an advantage, while exposing the client to the risk that the clause will not be valid;
- proposes a contractual clause that is invalid (whether the lawyer knows it or not); or
- makes representations to the client or to the other party or their counsel as to the current or prospective validity of the clause.²

These issues are not new to transactional practice. Most “repeat players” in the market periodically ask their lawyers to redraft their standard-form contracts in ways that increasingly favor the drafter. Some of these lawyers may intentionally draft clauses that are

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1. Under the UCC terminology, contracting out is really the process of *agreeing* otherwise from the UCC’s default provisions. *See infra* Part II.

2. *See infra* Part I (scenarios).

already invalid, are about to be invalid, or pose ethical issues. Even though the clauses may be marginally valid, their efforts may be with or without their clients' urgings. Other lawyers are not deliberate in their drafting efforts that "push the line" or include invalid clauses, but do so "because everyone else does it" or because their legal research is deficient.

These invalid and iffy clauses raise ethical issues, and a few of them violate the rules of professional responsibility. The core of this Article focuses on violations of the Model Rules of Professional Conduct (MRPC or Model Rules), with small excursions into the Restatement (Third) of the Law Governing Lawyers, as well as ethical, but uncodified, considerations.³ Admittedly, the literature on professional responsibility and ethics of the legal profession is thin on "transactional" issues; that is, those that lawyers confront when they put together transactional relationships. As such, many of the conclusions in this Article are based on inferences and analogies from the existing (but thin) literature that applies to transactional ethics.

My primary expertise is in commercial law rather than in legal ethics and professional responsibility. This Article is written from the former perspective, as an invitation to those in the latter field to do more work on the subject of "drafting on the edge."

I. COMMON TRANSACTIONAL SCENARIOS RAISING ETHICAL ISSUES

During the process of drafting and negotiating terms that contract out of the UCC (or any other mandatory rule of law), any of the following scenarios may unfold:

- *Scenario One:* During contract negotiations, one party includes a clause (often in a form contract) that is often used but is invalid. The other party objects to the clause being included, but the drafting party responds that "if the clause is not valid, why worry about it? Why not leave the clause in?" The other party, lacking bargaining power, acquiesces but does not comply with the clause.
- *Scenario Two:* During contract negotiations, one party

3. Some of these violations may also result in legal malpractice, but that is not the focus of this article.

includes a clause that is often used but is invalid. The other party does not know about the invalidity but objects to the clause as unfair, unnecessary or undesirable. The drafting party does not disclose the invalidity and prevails in keeping the clause in. The other party then complies with the clause, never learning of its invalidity.

- *Scenario Three:* During contract negotiations, one party includes a clause that is often used but is invalid. The other party does not object to the clause and later complies with the clause without learning of its invalidity.
- *Scenario Four:* During contract negotiations, one party includes a clause that is often used but has been the subject of criticism in commentary and has been invalidated in other jurisdictions. The other party does not object to the clause and later complies with it without learning of the arguments against its validity.
- *Scenario Five:* During contract negotiations, one party includes a clause that is often used in similar contracts. After contract formation, a court in that jurisdiction rules that these clauses are invalid (for instance, that the term is unconscionable or against public policy). The drafting party learns of the decision, but the other party does not and subsequently complies with the clause.

These scenarios may occur with neither, one, or both parties represented by attorneys. If neither party has an attorney, and if the drafted language did not come from a previous attorney-client relationship, then professional ethics are not implicated, only personal ethics. More commonly though, the party proposing the clause at issue is, or has been, represented by counsel who played a hand in drafting the clause. The focus then shifts to whether the other party has counsel as well. This variable sometimes affects the analysis of ethical and professional responsibility considerations.

II. DISCERNING DEFAULT RULES FROM MANDATORY RULES OF LAW

One source of an agreed clause's invalidity is when one or both

of the parties believe that the term takes the place of a default provision in the UCC when, in fact, the UCC provision is mandatory. But how does one discern whether a UCC provision is a mandatory rule or a default rule?

The UCC defines an “agreement” as the parties’ bargain-in-fact with each other, unencumbered by additions, subtractions, or modifications that occur by operation of rules of law.⁴ The UCC defines a “contract” as the parties’ agreement, as affected by mandatory and default rules of law.⁵ These rules of law are from both within and without the UCC. Examples of rules inside the UCC include the statute of frauds,⁶ the parol evidence rule,⁷ statutes of limitations,⁸ implied warranties,⁹ and rules on how to disclaim various warranties.¹⁰ Examples of rules outside of the UCC¹¹ include consumer protection laws,¹² various banking statutes and regulations,¹³ evidentiary rules that set standards for how to prove contract provisions and their breach,¹⁴ rules on what constitutes void title,¹⁵ and the Bankruptcy Code.¹⁶ The distinction between a mandatory contract provision¹⁷ and a default contract provision is

4. U.C.C. § 1-201(b)(3) (2003). As of August 2006, 21 states and the U.S. Virgin Islands have adopted revised Article 1. See Posting of Keith A. Rowley to ContractsProf Blog, Revised Article 1 Legislative Roundup, http://lawprofessors.typepad.com/contractsprof_blog/2006/08/revised_article.html (Aug. 23, 2006); NEIL COHEN, PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, MINUTES OF PEB MEETING (Nov. 11, 2005), <http://nccusl.org/update/minutes/PEB111105.pdf>. This Article’s analysis is unaffected by which version has been adopted in a particular jurisdiction.

5. U.C.C. § 1-201(b)(12).

6. *Id.* § 2-201.

7. *Id.* § 2-202.

8. *E.g., id.* §§ 2-725, 2A-506, 3-118, 4-111, 5-115, 6-110.

9. *E.g., id.* §§ 2-312, 2-314.

10. *E.g., id.* § 2-316.

11. In fact, two of the amended articles include sections listing some of the outside statutes that supersede or affect the operation of Article 2. *Id.* §§ 2-108, 2A-104.

12. See, e.g., 15 U.S.C. § 2302 (2000).

13. See, e.g., 12 U.S.C. § 4901 (2000).

14. See, e.g., FED. R. EVID. 408.

15. See, e.g., RESTATEMENT OF PROP. §§ 213, 222 (1936).

16. See, e.g., 11 U.S.C. §§ 101-1532 (2000).

17. This article uses “provision,” not “term,” for mandatory and default rules of law when they affect and therefore become part of the contract, because the UCC defines term as part of an agreement. U.C.C. § 1-201(b)(40) (2003). Because an agreement includes only the bargain of the parties in fact, and not operative law, a term cannot include a default or a mandatory rule of law. See U.C.C. §§ 1-201(b)(3), (b)(12).

sometimes delineated by the UCC. Some provisions say "unless otherwise agreed,"¹⁸ which is a sure sign that the provision is a default provision. However, the UCC is candid that not all default provisions are flagged by this language.¹⁹ Other provisions state which parts are mandatory and which are not. For instance, unamended section 2-725 states that the default statute of limitations for contracts for sale of goods is four years, but the parties can agree to a shorter statute of limitations, no shorter than one year.²⁰ However, the UCC often does not state whether a rule is mandatory or a default rule,²¹ and the courts have rarely addressed this issue. The result is a simmering set of controversies about the boundary lines of contracting out of the UCC. Those controversies are the focus of this Symposium.

Indeed, similar controversies simmer in non-UCC areas of law as well. For instance, what are the legal limits on clauses purporting to grant one or both parties injunctive relief in particular situations?²² Which non-assignability clauses are invalid, at least in part?²³ When are non-waiver clauses invalid because of the operation of mandatory rules of law like course of performance and waiver, and what must or should a lawyer do to avoid misleading a client about the variable validity of these clauses?²⁴ The same questions can be asked about no-oral-modification (NOM) clauses, which often fail because the parties subsequently waived them (even if there is a non-waiver clause).²⁵ Other terms teeter on the edge of invalidity or unenforceability because they create unfair trade practices or deceptive business practices. For instance, a settlement agreement with a state attorney general invalidated a company's penalty clause in an online rebate contract because the terms of the rebate and penalty were buried in three to four layers of hyperlinks.²⁶ In another

18. See, e.g., U.C.C. §§ 2-326, 2-327, 2-401(2) (2003).

19. See U.C.C. § 1-102(4) (2000) (amended 2003); U.C.C. § 1-302(c) (2003).

20. U.C.C. § 2-725 (2000).

21. See, e.g., *id.* §§ 2-201, 4-111.

22. See, e.g., Christina L. Kunz, *Teaching First-Year Contracts Students How to Read and Edit Contract Clauses*, 34 U. TOL. L. REV. 705, 709 & n.35 (2003).

23. See, e.g., E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 11.4, at 694-95 (4th ed. 2004).

24. See, e.g., Kunz, *supra* note 22, at 710 & nn.37-40.

25. See, e.g., *id.* at 711-12 & nn.44-47.

26. *CompUSA Agrees to Discontinue Practice of Placing Disclosures Behind Several Links*,

example, a settlement agreement with a state attorney general invalidated an online vendor's attempted modification because the modification was inconspicuous and contradictory, and therefore, a deceptive business practice.²⁷

These controversies about clause validity sometimes surface in contract negotiations or in memos from counsel to client about how to push the line on contracting out of seemingly mandatory rules. Sometimes the drafting party holds an honest belief that the clause is valid, while that party's counsel knows that the clause is invalid or knows that its validity is in controversy. In that situation, the law imputes counsel's knowledge to their client, the principal, in determining whether a third person (the other party) has been defrauded or otherwise disadvantaged under the MRPC.²⁸ In other situations, the drafting party actually knows of the clause's invalidity or the controversy about its validity and wants to gain the advantage that such a clause offers. If either the client or the attorney actually knows that the clause is invalid, then the focus shifts to whether the other party or its counsel know of the invalidity.²⁹

Sometimes the other party is oblivious to the clause's invalidity, but its counsel knows or should have known or discovered otherwise, in which case counsel's knowledge is imputed to that party³⁰ (and the issue may become one of possible malpractice between attorney and client). If the other party is not represented by counsel, then the variable of counsel's actual or constructive knowledge is not present. Then it is far easier for the other party to be defrauded³¹ or otherwise disadvantaged under the MRPC, unless the other party actually knew of the clause's invalidity before relying on the clause or the drafting party's representation about the clause's validity (because the other party, not the drafting party, caused the harm).

6 ELECTRONIC COM. & L. REP. (BNA) 562 (May 30, 2001), discussed in Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 282 n.15 (2003).

27. See *In re Juno Online Servs., Inc., Assurance of Discontinuance*, N.Y. Att'y Gen. Internet Bureau 8-9 (2002), available at http://www.oag.state.ny.us/internet/juno_assurance.pdf, discussed in Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 282 n.15 (2003).

28. See RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 5.03 (2006).

29. Cf. *id.* cmt. b.

30. See *id.*

31. See *infra* text accompanying notes 37-38.

On the other hand, if the clause is valid but pushes the line on a mandatory rule of law, the drafting party may still have some reasons for concern under the MRPC and other considerations of legal ethics. The next part of this Article sets out the portions of the MRPC that pertain to these scenarios and raise those ethical concerns.

III. APPLYING THE PRIME TOOLS FROM THE MRPC

A. MRPC Rule 1.2(d)

Rule 1.2 deals with the scope of representation and the allocation of authority between client and lawyer.³² Paragraph (d) of the rule states, "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal³³ or fraudulent"³⁴

The MRPC does not define "counsel" or "assist,"³⁵ but Ronald D. Rotunda and John S. Dzienkowski have paraphrased the words as meaning

that the lawyer cannot advise (urge, suggest, propose, counsel, exhort) the client to break the law. If the client has no privilege to engage in certain conduct, lawyers have no privilege to assist the client to engage in that conduct. The lawyer is an agent of the client, and . . . an agent has no defense in committing a tort simply because he was acting under orders of the principal.³⁶

Rule 1.0(d) defines fraud as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."³⁷ However, "merely negligent misrepresentation or negligent failure to apprise another of relevant

32. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2006).

33. A variety of crimes may occur in the course of drafting and negotiating contracts. For a discussion of criminal offenses involved in transactional ethics violations, see *infra* Part III.B.

34. MODEL RULES OF PROF'L CONDUCT R. 1.2(d). The rule continues: "[B]ut a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." *Id.*

35. See *id.* R. 1.0.

36. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS—THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 107-08 (A.B.A. Ctr. For Prof'l Responsibility ed., 2006-07).

37. MODEL RULES OF PROF'L CONDUCT R. 1.0(d).

information” does not constitute fraudulent conduct.³⁸ Thus, if a drafting party includes an invalid clause to gain a tactical advantage, it will be fraudulent only if the drafting party or its counsel meant to deceive the other party.³⁹ A lawyer who drafts or negotiates a clause designed to make inroads into a mandatory rule of law likely will not violate Rule 1.2 unless some deception attends the negotiation of that clause.⁴⁰ The same is true of a clause in controversy, but not yet adjudicated as invalid in a particular jurisdiction.⁴¹

According to an ABA Formal Opinion, a lawyer representing a client may advise the client of

positions most favorable to the client if the lawyer has a good-faith belief that such positions are warranted in existing law or can be supported by a good-faith argument for an extension, modification, or reversal of existing law . . . [;] a good-faith belief can exist even if the lawyer believes the position will not prevail . . . [;] good faith requires some realistic possibility of success.⁴²

If a lawyer drafts a clause of doubtful validity, the lawyer’s good-faith belief in the clause’s chances for success becomes relevant under this Opinion.

A lawyer should not undertake representation without inquiring further into whether the facts presented by the prospective client suggest that the lawyer might be aiding the client in perpetrating fraud.⁴³ During the representation, a lawyer who “present[s] an

38. *Id.* R. 1.0 cmt. 5.

39. *See id.* R. 1.0 (d); *see, e.g., In re Rausch*, 32 P.3d 1181, 1195-96 (Kan. 2001) (lawyer suspended for two years because of misdemeanor conviction for deceptive business practice, civil judgment for common law fraud, and various abuses of own trust account, assisting in client’s fraudulent scheme); ROTUNDA & DZIENKOWSKI, *supra* note 36, at 111-12 n.21 (citing *McElhanon v. Hing*, 728 P.2d 256 (Ariz. Ct. App. 1985), *aff’d in part & rev’d in part on other grounds*, 728 P.2d 273 (Ariz. 1986) (lawyer not privileged against liability for assisting client by drafting document to execute transfer in fraud of judgment creditor when lawyer had knowledge of facts and intent to defraud); *Faison v. Nationwide Mortgage Corp.*, 839 F.2d 680 (D.C. Cir. 1987), *cert. denied*, 488 U.S. 823 (1988) (lawyer liable for helping clients make fraudulent and unlawful loan by making and helping arrange misrepresentations)); *see also infra* note 73.

40. *See* Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361, 380 (2002); MODEL RULES OF PROF’L CONDUCT R. 1.0(d), 1.1, 1.2(d), 4.1(b).

41. Carrington, *supra* note 40, at 384.

42. ANN. MODEL RULES OF PROF’L CONDUCT R. 1.2 annots. at 40 (2003) (Subsection (d): Counseling or Assisting in Unlawful or Fraudulent Conduct) (citing ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 85-352 (1985) (discussing lawyer’s preparation of tax return)).

43. *Id.* (citing ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1470 (1981)

analysis of legal aspects of questionable conduct" is not necessarily a party to the client's fraudulent or criminal conduct if the lawyer does not also "recommend[] the means by which a crime or fraud might be committed with impunity"⁴⁴ or engage in other affirmative conduct, such as "assisting the client . . . by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed."⁴⁵ Thus, Rule 1.2 is violated when a lawyer suggests burying or actually buries an invalid provision in a contract (perhaps using obscure language or an unobvious location) or forwards a contract draft to the other party while aware that the draft contains this kind of concealment.

A comment to Rule 1.2 states:

A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.⁴⁶

If the "client insists" on "pursuing an objective" that is not illegal but that "the lawyer considers repugnant or imprudent," Rule 1.16(b)(3) allows (but does not require) the lawyer to withdraw from further representation.⁴⁷ Particularly in situations where the other party is not represented by counsel, the lawyer for the drafting party may become morally uncomfortable with clauses that violate or abrogate what the lawyer thinks are mandatory rules. In such a setting, Rule 1.16 allows the lawyer to withdraw from representing

(stating a lawyer should not undertake representation without making further inquiry if facts presented by prospective client suggest representation might aid client in perpetrating fraud or otherwise committing a crime)); *see, e.g.*, *Kline v. First W. Gov't Sec., Inc.*, 24 F.3d 480, 486 (3d Cir. 1994) (holding a lawyer is liable under federal securities laws for providing an opinion letter based on facts that the lawyer knows are false, even if the letter explicitly states that the lawyer was basing his opinion on an assumed set of facts that the client had supplied and that the lawyer had conducted no independent investigation).

44. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 9.

45. *Id.* R. 1.2 cmt. 10.

46. *Id.*

47. *See id.* R. 1.16(b)(3).

the client.⁴⁸

Geoffrey C. Hazard and W. William Hodes include an illustration in *The Law of Lawyering* that resembles some of the scenarios in this Article:

The highest court of State recently held that a certain clause in a consumer goods contract is unconscionable and therefore unenforceable. A retail store in State nevertheless insists that its lawyer, L, continue to include the clause in its contracts, on the grounds that the great majority of consumers will not know it is unenforceable and thus will comply with its terms anyway.⁴⁹

The authors continue with the following commentary:

The Proposed Final Draft of Rule 1.2(d) . . . included language that would have prohibited the preparation of an instrument “containing terms the lawyer knows or reasonably should know are legally prohibited.” The ABA House of Delegates deleted this provision, however, before promulgation of the Model Rules in 1983. The Ethics 2000 Commission . . . did not recommend restoration of the deleted text. Given this drafting history, it would seem that L could not now be disciplined merely for including the unconscionable clause in the contract.

On the other hand, if the clause is likely to mislead customers as to their rights, use of the clause might be held to constitute fraud. If so, the general prohibition in Rule 1.2(d) against assisting in fraud would again be applicable.

L might seek to dissuade his client from including the clause, bringing to bear moral and other nonlegal concerns, as contemplated by Rule 2.1. . . . L might point out, for example, that continued inclusion of the unconscionable clause could result in class action liability and adverse publicity if the practice is challenged in court or criticized in the media. L might also resign or threaten to resign, pointing to his right under Rule 1.16(b)(4) to withdraw if

48. *Id.* R. 1.16(b)(7) cmt. 7 (2006).

49. GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 5.12, illus. 5-13 (3d ed. 2001-2005) (Including an Unconscionable Clause in a Contract); *see supra* text accompanying notes 36-37.

the client "insists upon pursuing an objective that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement" Most clients would treat seriously the views of a trusted counselor who was willing to resign over a matter of principle.⁵⁰

A later section of this Article revisits the latter point in its analysis of Rule 2.1.⁵¹

Paul D. Carrington takes an even stronger position in writing about "unconscionable lawyers."⁵² He is strongly critical of the "raging epidemic of provisions in standard form contracts purporting to strip the party on whom they are imposed of needed procedural rights."⁵³ His article focuses primarily on arbitration clauses and their accompanying "bells and whistles," i.e., clauses that apply only to the other party, location of arbitration favorable to the drafting party, the drafting party's right to select the arbitrator, the other party's inability to require the arbitrator to be a knowledgeable lawyer, the other party's duty to pay some arbitral costs not present in litigation, bars against claim aggregation and class actions, shorter statutes of limitations, caps on damages, exclusion of punitive damages, and deprivation of the other party's statutory right to attorney fees.⁵⁴ However, his conclusions apply to a much wider collection of clauses, including some of the clauses examined in this Symposium.

Carrington first examines the rules of law regulating adhesion contracts in the areas of insurance, franchises, consumer goods, employment, contracts, carriers, and predatory businesses.⁵⁵ He makes the point that "[i]f a predatory business can exempt itself from the enforcement of these laws by imposing disabling contract

50. HAZARD & HODES, *supra* note 49, § 5.12, illus. 5-13.

51. *See infra* Part III.C.

52. Carrington, *supra* note 40, at 361.

53. *Id.* at 363.

54. *See id.* at 374-79. Indeed, in *Comb v. PayPal*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002), the court struck down the PayPal arbitration clause as both procedurally and substantively unconscionable, based on some of the "bells and whistles" mentioned in Carrington's article. *Id.* at 1173, 1177. The court did not, however, mention any ethical issues. After *Comb*, though, especially in the Northern District of California, one wonders about the ethical obligation of counsel to warn clients about the possible invalidity of consumer contracts containing these relatively common clauses, based on Model Rule 1.1. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006) (establishing a lawyer's duty of competent representation).

55. Carrington, *supra* note 40, at 366-70.

provisions on all the private attorneys general on whom we rely, our substantive regulatory laws will have been *pro tanto* repealed. Such a business would have achieved self-deregulation.”⁵⁶ He then argues that lawyers who serve clients with the economic power “to self-deregulate by gaining control of dispute resolution procedures through the terms of standard form contracts”⁵⁷ have countervailing professional responsibilities.⁵⁸ He theorizes that

[t]he ethical problem begins with the impulse of lawyers to think of the drafting of form contracts as an adversarial activity in disregard of any consideration of the rights of the other parties to the contracts who may be illiterate, ignorant, disabled, inattentive, improvident, or just too weak to protect their interests, and almost certainly will not be advised by counsel at the moment when they receive the form. There being no real adversary, the conditions justifying the adversarial tradition are absent.⁵⁹

Carrington notes that the MRPC contains no explicit provisions on disciplining such lawyers and that a stronger provision drafted by the Kutak Commission has been rejected.⁶⁰ The proposed provision (noted above in Hazard and Hodes’ commentary about the unconscionable lawyer hypothetical⁶¹) would have prohibited “a lawyer [from] assisting a client to conclude an agreement ‘that the lawyer knows or reasonably should know is illegal, contains legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law.’”⁶² Although Carrington theorizes that the reason for the rejection of this provision may have been because it was “too indeterminate . . . for quasi-criminal professional discipline,”⁶³ another possible reason is the long-standing debate among practitioners as to the zealousness of lawyers’ advocacy on behalf of clients. Carrington mentions, on one side,

56. *Id.* at 369-70.

57. *Id.* at 370.

58. *See id.* at 379-84.

59. *Id.* at 370.

60. *Id.* at 380.

61. *See supra* text accompanying note 50.

62. Carrington, *supra* note 40, at 380 (quoting MODEL RULES OF PROF’L CONDUCT R. 4.3 (Discussion Draft 1980)).

63. *Id.* at 380.

Henry Brougham, David Dudley Field, and Moorfield Storey, and on the other side, George Wythe, David Hoffman, Louis Brandeis, and others;⁶⁴ but, of course, the current legal literature is replete with the same debate in more contemporary terms.⁶⁵ Carrington realizes these practical debates mean that disciplinary sanctions are only a remote possibility against lawyers who merely "assist their clients in abusing their economic power"⁶⁶ without violating Rule 1.2 or Rule 8.4.⁶⁷

B. Rule 8.4

Rule 8.4 makes it
professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; [or] (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation⁶⁸

Part (c) "encompasses conduct toward clients, tribunals, parties, witnesses, opposing counsel, and everyone else, both within and outside the realm of the practice of law. It covers the act of failing to disclose, as well as affirmatively lying Neither damages nor detrimental reliance is a necessary element"⁶⁹ As in Rule 1.2,

64. *Id.* at 380-83.

65. *See, e.g.,* sources cited *infra* notes 120 & 122.

66. Carrington, *supra* note 40, at 384.

67. *See id.* at 379-84.

68. MODEL RULES OF PROF'L CONDUCT R. 8.4(a)-(c) (2006). The remaining portions of Rule 8.4 usually do not pertain to the scenarios discussed in this Article. Rule 8.4(d), which forbids "conduct that is prejudicial to the administration of justice," has almost always been applied to court cases, agency proceedings, and other aspects of dispute resolution. The ABA annotations for Rule 8.4(d) cite a case involving a lawyer's misrepresentation to an insurer in a real estate purchase. *In re Bruner*, 469 S.E.2d 55, 56 n.1 (S.C. 1996), *cited in* ANN. MODEL RULES OF PROF'L CONDUCT R. 8.4 annots. at 617 (2003) (Subsection (d): Conduct Prejudicial to the Administration of Justice) (finding Respondent engaged in fraud, dishonesty, and deceit under both the South Carolina Rules of Professional Practice and Rule 8.4(d)). That case, however, should instead appear in the annotations for Rule 8.4(c) because South Carolina's Rule 8.4(d) is identical to MRPC 8.4(c). *Compare* S.C. CODE ANN. § 407 R. 8.4 (1976), *with* MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

69. ANN. MODEL RULES OF PROF'L CONDUCT R. 8.4 annots. at 608 (Subsection (c): Dishonesty, Fraud, Deceit, or Misrepresentation).

“fraud” is defined in Rule 1.0(d) and includes scienter.⁷⁰ Dishonesty that is not fraudulent is also within Rule 8.4(c).⁷¹ A lawyer violates Rule 8.4(c) by drafting an invalid clause and deceiving a client into thinking that it is valid, or by representing to a client that the clause is completely valid when the lawyer knows that the clause is iffy.⁷² Other violations occur when a lawyer makes the same kind of misrepresentations to the other party or its counsel, or to other non-clients.⁷³ Yet another violation occurs when the lawyer talks the client into misrepresenting the clause’s validity to the other party or even a third person. Hazard and Hodes note that Rule 8.4(c) lacks a “materiality” limitation but that “courts and disciplinary authorities . . . generally have given it a sensible reading that forgives truly trivial deceptions and misrepresentations.”⁷⁴

“The same conduct that violates Rule 8.4(c) . . . also violates Rule 8.4(b) if the conduct constitutes a crime.”⁷⁵ For instance, a lawyer convicted of a misdemeanor for deceptive business practices, possibly for deceptive contract drafting, might be disciplined under Rule 8.4(b).⁷⁶ “A pattern of repeated offenses, even ones of minor

70. See MODEL RULES OF PROF’L CONDUCT R. 1.0(d), (f).

71. *Id.* R. 8.4(c).

72. See, e.g., ANN. MODEL RULES OF PROF’L CONDUCT R. 8.4 annots. at 609, 612 (Subsection (c): Dishonesty, Fraud, Deceit, or Misrepresentation) (citing *In re Brown*, 2001-2863, pp. 1, 2, 6 (La. 3/22/02); 813 So. 2d 325, 326, 328 (lawyer deceived clients as to paralegal working as a lawyer); *In re Wahlder*, 98-2742, pp. 1, 2 (La. 1/15/99); 728 So. 2d 837, 838 (lawyer falsified documents by letting client sign wife’s name to document and then told law office employee to notarize the signature); *In re Frost*, 793 A.2d 699, 705, 706-07 (N.J. 2002) (lawyer entered into “patently unfair” loan agreement with client and made misrepresentations to client)).

73. See, e.g., *id.* R. 8.4 annots. at 611-12 (Subsection (c): Dishonesty, Fraud, Deceit, or Misrepresentation) (citing *In re Disciplinary Action Against Shinnick*, 552 N.W.2d 212, 214 (Minn. 1996) (lawyer violated Rule 8.4(c) due to his deceit and fraud in corporate transactions to which he was a party, officer, or board member, but not counsel); *In re Conduct of Gallagher*, 26 P.3d 131, 132, 135-36 (Or. 2001) (lawyer had duty to correct known error in settlement checks made by opposing counsel, rather than “duping” opposing counsel); ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 86-1518 (1986) (lawyer should give notice of inadvertent omission from contract to prevent unfair advantage to own client because of error), *discussed further in infra* text accompanying notes 129-135)).

74. HAZARD & HODES, *supra* note 49, § 65.5.

75. ANN. MODEL RULES OF PROF’L CONDUCT R. 8.4 annots. at 605-06 (Subsection (b): Criminal Conduct); see also ROTUNDA & DZIENKOWSKI, *supra* note 36, § 8.4-2(c) (Criminal Acts).

76. See ANN. MODEL RULES OF PROF’L CONDUCT R. 8.4 annots. at 605-06 (Subsection (b): Criminal Conduct) (citing *In re Rausch*, 32 P.3d 1181, 1186, 1188-90, 1196 (Kan. 2001) (lawyer suspended for two years because of misdemeanor conviction for deceptive business practice, civil judgment for common law fraud, various abuses of own trust account, and assisting in client’s

significance when considered separately, can indicate indifference to legal obligation."⁷⁷ The lawyer need not be charged with or convicted of the crime.⁷⁸ Possible crimes in a transactional setting include felonies for bankruptcy fraud,⁷⁹ fraudulent bidding schemes,⁸⁰ felony conspiracy to commit tax fraud,⁸¹ and attempted tax evasion.⁸²

Rule 8.4 is somewhat redundant with other Model Rules, including Rule 1.2(d), but is slightly broader in scope. It includes conduct not specifically connected to the practice of law or a lawyer-client relationship.⁸³ It encompasses the lawyer's dishonesty, deceit, and misrepresentation (as well as fraudulent and criminal conduct).⁸⁴ Rule 8.4(a) extends to all violations, actual and attempted, of the MRPC, as well as assistance in such violations,⁸⁵ including supervision of a lawyer who does the violation.⁸⁶ "[I]f a supervisory [sic] lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension."⁸⁷

C. Rule 2.1

The comments to Rule 2.1 explain that the client is entitled to "straightforward," "candid," and even "unpalatable" advice, including "unpleasant facts and alternatives that a client may be disinclined to confront."⁸⁸ This rule also allows insights from other fields, practical implications, and moral considerations.⁸⁹ Although the rule says that a lawyer rendering advice "*may* refer . . . to other

fraudulent scheme)).

77. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2 (2006).

78. ANN. MODEL RULES OF PROF'L CONDUCT R. 8.4 annots. at 604 (Subsection (b): Criminal Conduct).

79. *See In re McIntosh*, 991 P.2d 403, 404-05 (Kan. 1999).

80. *In re Scott*, 2001-1337, pp. 1-2, 7-8 (La. 1/15/02); 805 So. 2d 137, 138, 141-42.

81. *Dayton Bar Ass'n v. Seall*, 690 N.E.2d 1271, 1271 (Ohio 1998).

82. *In re Ellner*, 686 N.Y.S.2d 806, 806-07 (N.Y. App. Div. 1999).

83. *Compare* MODEL RULES OF PROF'L CONDUCT R. 8.4 (2006), *with id.* R. 1.2(d). *See id.* R. 8.4 cmt. 2.

84. *Id.* R. 8.4(b) cmt. 2.

85. *Id.* R. 8.4(a).

86. *Id.* R. 5.1(c)(2).

87. ROTUNDA & DZIENKOWSKI, *supra* note 36, § 8.4-2(b), at 1187 (citing MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 5).

88. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 1.

89. *Id.* R. 2.1 & cmts. 2 & 4.

considerations such as moral, economic, social and political factors, that may be relevant to the client's situation,"⁹⁰ some cases are so infused with nonlegal considerations that a lawyer *has a duty* to raise these considerations, lest the lawyer's advice become inadequate and thereby violate Rule 1.1 as to competence or Rule 1.4 as to a lawyer's communication.⁹¹

Occasionally, a court rules that the optional discourse in Rule 2.1 is mandatory in some circumstances. In *In re Marriage of Foran*,⁹² the Washington Court of Appeals refused to enforce a prenuptial contract that was "economically unfair" (because it was steeply slanted to the future husband's interests) and was not "voluntarily and intelligently" entered into (because the wife-to-be was not represented by counsel and had been subject to domestic violence before the marriage).⁹³ The court stated that

[a]n attorney who represents either party to a prenuptial contract should seriously consider the implications of RPC 2.1 ([as to] moral, economic, social and political factors, that may be relevant to the client's situation[]). A client is not well served by an unenforceable contract. Marital tranquility is not achieved by a contract which is economically unfair or achieved by unfair means.⁹⁴

Indeed, cases such as *Foran* pose additional ethical issues

90. *Id.* R. 2.1 (emphasis added).

91. See *id.* R. 1.1, 1.4, 2.1; HAZARD & HODES, *supra* note 49, § 23.3, at 23-24. The authors noted that:

lawyers frequently are put into a position where they must help a client attain something that the lawyer—if not "in role"—would disapprove, while the lawyer tries to maintain a sense of his or her own rectitude and moral autonomy.

One way out of this dilemma is for the lawyer to take advantage of the opportunity provided by Rule 2.1 and Restatement §94(3) to engage the client in frank discussion about the very factors that give the lawyer pause—a moral dialog between autonomous individuals. The point of this exercise is not only to provide the client with more insight into the overall ramifications of a decision that is at hand. The additional point is that such a dialog permits the lawyer to exercise moral autonomy by attempting to dissuade the client from a particular course of action *on overtly non-legal grounds*. The client, of course, may in turn exercise autonomy by rejecting this advice, and directing the lawyer to continue the representation as originally contemplated—always assuming that both the ends and the means are still lawful.

Id. § 23.4.

92. 834 P.2d 1081 (Wash. Ct. App. 1992).

93. See *id.* at 1086-87, 1090 & n.17.

94. *Id.* at 1089 n.14.

beyond Rule 2.1. Rule 1.1 requires a lawyer to “provide competent representation to a client.”⁹⁵ Comment 2 to Rule 1.1 mentions “[s]ome important legal skills, such as the analysis of precedent . . . and legal drafting, [that] are required in all legal problems.”⁹⁶ If a lawyer drafts a contract so favorable to the client that the lawyer risks invalidating all or part of the contract, Rule 1.1 arguably dictates that the lawyer analyze the precedent to discern the risk of invalidity, then either redraft accordingly or advise the client of that risk.⁹⁷ This allows the client to assess the risk and potential consequences of invalidation to decide whether to assume that risk.

Recall that in Hazard and Hodes’ illustration concerning a lawyer who drafts an unconscionable contract clause, quoted earlier as to Rule 1.2,⁹⁸ the commentators noted that

L might seek to dissuade his client from including the clause, bringing to bear moral and other nonlegal concerns, as contemplated by Rule 2.1. . . . L might point out, for example, that continued inclusion of the unconscionable clause could result in class action liability and adverse publicity if the practice is challenged in court or criticized in the media.⁹⁹

Rule 2.1 plays an especially valuable role as to clauses that attempt to contract out of mandatory rules of law or dance on the edge of invalidity. Moral, economic, social, and political considerations are often the best arguments against including invalid clauses even when the drafting party represents them as harmless.¹⁰⁰ As to clauses that only the drafting party or attorney knows are invalid, Rule 2.1 mandates that the lawyer give the client “candid” and even “unpalatable advice,” without soft-pedaling the bad news that a particular clause is not valid.¹⁰¹ If a particular clause is iffy because it has been criticized or even struck down in another

95. MODEL RULES OF PROF’L CONDUCT R. 1.1.

96. *Id.* R. 1.1 cmt. 2.

97. *See id.* R. 1.1 & cmts. 2 & 5.

98. *See supra* text accompanying notes 49-50.

99. HAZARD & HODES, *supra* note 49, § 5.12, illus. 5-13, at 5-40 (Including an Unconscionable Clause in a Contract).

100. MODEL RULES OF PROF’L CONDUCT R. 2.1 & cmt. 1; *see supra* Part I (Scenario One).

101. *See* MODEL RULES OF PROF’L CONDUCT R. 2.1 & cmt. 1; *supra* Part I (Scenarios Two and Three).

jurisdiction,¹⁰² the client needs to hear and consider the possibility of mandatory precedent against the clause during or after the life of the contract. The lawyer should seriously consider urging the client to consider practicalities, such as how a clause that later becomes invalid will affect the parties' relationship, performance on both sides, public perceptions, other contracts with the same language, and other concurrent negotiations.

D. Rule 4.1(a)

Rule 4.1(a) states, "In the course of representing a client a lawyer shall not knowingly:¹⁰³ (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent¹⁰⁴ act by a client, unless disclosure is prohibited by Rule 1.6."¹⁰⁵ The "third persons" covered by this rule include "opponents, witnesses, opposing counsel, and court personnel."¹⁰⁶ Comment 1 states that "[m]isrepresentations can . . . occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."¹⁰⁷ Although Comment 1 states that "[a] lawyer . . . generally has no affirmative duty to inform an opposing party of relevant facts," the Comment has been amended to include a

102. See *supra* Part I (Scenarios Four and Five).

103. "Knowingly" means "actual knowledge of the fact in question," which may be "inferred from [the] circumstances." MODEL RULES OF PROF'L CONDUCT R. 1.0(f). The Second Circuit held a lawyer liable for fraud for his misrepresentation of the client's insurance coverage during settlement negotiations, when a document in the lawyer's possession said otherwise. The court found that the lawyer had sufficient scienter under New York law because of his "reckless indifference to error," his "pretense of exact knowledge," or his "assertion of a false material fact 'susceptible of accurate knowledge' but stated to be true on the personal knowledge of the representer." *Slotkin v. Citizens Cas. Co. of N.Y.*, 614 F.2d 301, 314-15 (2d Cir. 1979) (quoting *Burgundy Basin Inn v. Watkins Glen Grand Prix*, 379 N.Y.S.2d 873, 879 (App. Div. 1976)). The lawyer was later disciplined for this misrepresentation and other errors. *In re McGrath*, 468 N.Y.S.2d 349, 351-52 (App. Div. 1983).

104. For the definition of "fraudulent," see *supra* text accompanying notes 37-38.

105. MODEL RULES OF PROF'L CONDUCT R. 4.1. The Rules do not define "material." For analysis of the versions of Rule 1.6, see ROTUNDA & DZIENKOWSKI, *supra* note 36, § 4.1-3(b), (c), at 819-22.

106. ANN. MODEL RULES OF PROF'L CONDUCT R. 4.1 annots. at 412 (2003) (Subsection (a): Making False Statements to Third Persons). In some respects, Rule 4.1(b) is a close cousin to Rule 3.3(a)(3), counsel's duty of candor to the court, including the duty to disclose adverse precedent. *Id.* R. 3.3(a)(3); see HAZARD & HODES, *supra* note 49, § 5.2, at 5-6. See generally Christopher W. Deering, *Candor Toward the Tribunal: Should an Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 SUFFOLK U. L. REV. 59 (1997).

107. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1.

cross-reference to Rule 8.4,¹⁰⁸ which forbids a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."¹⁰⁹

Section 98 of the Restatement (Third) of the Law Governing Lawyers closely resembles Rule 4.1(b). It states, "[A] lawyer communicating on behalf of a client with a nonclient may not . . . fail to make a disclosure of information required by law"¹¹⁰ in litigative as well as non-litigative situations, whether made to a lawyer or a nonlawyer.¹¹¹

Hazard and Hodes summarize Rule 4.1(a) as standing for the uncontroversial proposition that "although lawyers are supposed to be zealous partisans of their clients, they must draw the line at lying [materially]. . . . Rule 4.1(b), on the other hand, is more controversial . . . [in] establishing the proper response for a lawyer faced with client fraud in which the lawyer's services may have been used."¹¹²

If a client wishes its lawyer to "make a false statement of material fact or law to a third person" in violation of Rule 4.1(a),¹¹³ the lawyer can merely refuse to make such a statement. However, if a client wishes its lawyer to "fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client," and if the disclosure is a client confidentiality protected by Rule 1.6,¹¹⁴ then the lawyer (if he or she cannot change the client's mind) must withdraw from representation (under Rule 1.16) to avoid violating Rule 1.2's prohibition against helping the client engage in criminal or fraudulent conduct.¹¹⁵ In some situations, the lawyer may also need to notify the other party or its lawyer that it has ceased to represent the drafting party.¹¹⁶

If documents, which contain falsehoods, have been given to

108. *Id.*

109. *Id.* R. 8.4(c).

110. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (2000)

111. *Id.* § 98 cmts. (a) & (b).

112. HAZARD & HODES, *supra* note 49, § 37.2, at 37-3 (emphasis omitted). They note that Rule 3.3(a) forbids "all false statements of fact [not just material ones] made to a tribunal by a lawyer Whether the . . . more relaxed standard for out-of-court statements is appropriate remains a matter of some debate." *Id.* § 37.3, at 37-6, 37-7.

113. MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2006).

114. *Id.* R. 4.1(b); see *supra* note 105 as to versions of Rule 1.6.

115. ROTUNDA & DZIENKOWSKI, *supra* note 36, § 4.1-3(a), at 817-18.

116. *Id.* at 819.

the opposing party, the lawyer will probably need to disaffirm them even though this signals implicitly that a problem exists with those documents. Whether a lawyer may [or must] go further and disclose information about the crime or fraud, depends upon the state's version of Rule 1.6.¹¹⁷

Another tricky situation for a lawyer is when a lawyer is questioned closely by a third party,

and a truthful answer will hurt the lawyer's client. Rule 4.1(a) provides that a lawyer may not lie if the matter is material; she may only refuse to answer, evade answering, or request an opportunity to consult with her client. Of course hedging may alert the other party to be on further inquiry, and often it will have the same detrimental effect as a truthful answer [L]awyers and other negotiators can develop tactics to parry direct inquiries, such as hedging *all* their answers, so that further hedging will not unintentionally signal the truth.¹¹⁸

Comment 2 notes that

[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.¹¹⁹

117. *Id.*

118. HAZARD & HODES, *supra* note 49, § 37.3, at 37-7, 37-8. In response to a factual situation about a lawyer who is asked just such a probing question by the other party during a negotiation, the authors analyze the alternatives of making a limited answer, engaging in speculation, remaining silent, and otherwise evading the question. *Id.* illus. 37-1, at 37-9, 37-10 (Making Misleading Statements During a Negotiation).

119. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2. Similarly, the Third Restatement of the Law Governing Lawyers says that "[c]ertain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 cmt. c (2000). The comment goes on to list tests and factors used to judge whether a statement is a representation of puffing. *Id.* For the factors considered in determining whether a statement is puffing, see generally CAROL L. CHOMSKY & CHRISTINA L. KUNZ, SALE OF GOODS: READING AND APPLYING THE CODE 131-35 (2d ed. 2004).

The original version of this comment generated considerable responses from commentators on lawyering styles, negotiation ethics, and settlement agreements.¹²⁰ The comment was amended in 2002 to add the word "ordinarily" before the two examples mentioned above,¹²¹ but the debate rages on as to the adequacy of that response and the underlying issues.¹²²

Indeed, the propriety of—and even the need for—"puffing" and disingenuity in negotiation is a long-standing topic of disagreement among commentators.¹²³ One view is that

negotiation interactions involve a deceptive process in which a certain amount of "puffing" and "embellishment" is expected, as the participants attempt to convince their opponents that they must obtain better terms than they must

120. See, e.g., ANN. MODEL RULES OF PROF'L CONDUCT R. 4.1 annots. at 414 (2003) (Subsection (a): Making False Statements to Third Persons) (citing Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 696 (2001) (minimalist approach of Rule 4.1 "in imposing obligation[] of truthfulness is [due to] moral ambiguity of truthfulness as an ideal in the context of share bargaining" and difficulties of enforcing truth-telling rule in "community of two."); Charles B. Craver, *Negotiation Ethics: How to be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713, 715 (1997) ("[T]he fundamental question is not whether legal negotiators may use misrepresentations to further client interests, but when and about what they may permissibly dissemble."); Michael G. Daigneault & Jack Marshall, *A House Divided*, 44 FED. LAW, May 1997, 18, at 18, 19 (discussing flaws in Rule 4.1, and need for legal community to address negotiation ethics; "[w]hat is permissible versus impermissible in negotiation appears largely to be a matter of opinion, semantics, and circumstance[]"); Mary Jo Eyster, *Clinical Teaching, Ethical Negotiation, and Moral Judgment*, 75 NEB. L. REV. 752, 757–59, 800-01 (1996) (explaining that although the "negotiation process lends itself to . . . unscrupulous conduct," legal scholars do not agree upon what practices should be prohibited; reform must come by educating lawyers to engage in "sound moral reasoning"); Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 94 (2002) (taking issue with implication in Rule 4.1 and Comment that "barring all types of misrepresentation would demand too much"); Paul Rosenberger, *Laissez-"Fair": An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators*, 13 OHIO ST. J. ON DISP. RESOL. 611, 638 (1998) (stating that "further good faith and fair dealing" requirements for negotiations would be "unworkable and create more problems than [it w]ould solve.")).

121. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2.

122. See, e.g., Van M. Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40 WILLIAMETTE L. REV. 181, 192-98 (2004) (citing John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 97 (1997)); Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 GEO. J. LEGAL ETHICS 1089, 1114-15 (2006).

123. See sources cited *supra* note 120; Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1388, 1391-95 (1986). See generally Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 580-83 (1975); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 927-28 (1980).

actually achieve '[N]o one tells the truth all of the time, nor is perpetual truth telling expected in most circumstances Thus, a person considered trustworthy and a truth teller actually is a person who tells the truth at the right or necessary time.'¹²⁴

An opposing view is that Rule 4.1 is "insufficient and ineffective";¹²⁵ a better set of rules would be the five principles from *A Negotiation Ethics Primer for Lawyers*:¹²⁶ (1) a lawyer must obey substantive laws and advise a client to do so; (2) "a lawyer must not make material misrepresentations, conceal material facts, or advise or assist a client in doing so"; (3) a lawyer must avoid another's detrimental reliance by correcting errors or misunderstandings generated by the lawyer or the client (or must resign); (4) the rules should encourage discussion of "moral or ethical consequences of a proposed course of action . . . with a client"; and (5) the rules must allow a lawyer to refuse to comply with client conduct that the lawyer thinks is unlawful or dishonest.¹²⁷

Rule 4.1 is often applied to a particular kind of contract negotiations—the negotiation of a settlement agreement.¹²⁸ In this setting, both parties are represented by counsel, and the party most likely to prevail at trial usually has greater bargaining power.

In 1986, the ABA issued an informal opinion on the ethical duty of a lawyer who has discovered that an agreed clause unfavorable to his or her client has been inadvertently omitted from the final signed version of the agreement.¹²⁹ The conclusion was that the lawyer should contact the other party's lawyer to correct the error and need

124. *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 450 n.14 (D. Md. 2002) (setting a four-part test for determining violations of Rule 4.1(a)(1) by attorney during settlement negotiations and to court clerk) (quoting Craver, *supra* note 120, at 716).

125. See Daigneault & Marshall, *supra* note 120, at 20.

126. *Id.* (citing Peter R. Jarvis & Bradley F. Tellam, *A Negotiation Ethics Primer for Lawyers*, 31 GONZ. L. REV. 549, 551 (1996)).

127. *Id.*

128. See *Ausherman*, 212 F. Supp. 2d at 446 ("[C]ertain aspects of [negotiation] unavoidably involve statements that are less than completely accurate, such as posturing or puffery, intentional vagueness regarding a negotiating party's 'bottom line,' estimates of price or value, and the party's ultimate intentions regarding what an acceptable settlement would be—all of which are thought to encompass representations that are not 'material.'").

129. The opinion did not "reach the issue of the lawyer's duty if the client wishes to exploit the error." ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1518 n.1 (1986) (notice to opposing counsel of inadvertent omission of contract provision).

not contact his or her client about the error.¹³⁰ The ABA committee reasoned that the scrivener's error occurred after the parties had agreed to the clause, so the self-executing remedy is reformation.¹³¹ Rule 1.4 does not apply because the client has already made the decision and told the lawyer of that decision.¹³² Rule 1.2's comment allows a lawyer to "decide the 'technical' means to be employed to carry out the objective of the representation, without consultation with the client."¹³³ The client has a right to "committed and dedicated representation" under Rule 1.2 but does not have a right to insist that its lawyer "capitalize on the clerical error."¹³⁴ Rule 1.2(d) forbids a lawyer from counseling or assisting a client to engage in fraudulent conduct; Rule 4.1(b) mandates a lawyer's disclosure of a material fact to a third person when necessary to prevent assisting the client in fraud; and Rule 8.4(c) bars a lawyer's conduct involving dishonesty, fraud, deceit, or misrepresentation.¹³⁵

Taken together, this latter trio of rules weighs in favor of a lawyer's disclosure that he or she knows that a proposed clause is invalid, regardless of whether the other party or its lawyer knows of the invalidity, unless Rule 1.6's protection of client confidences outweighs those rules.¹³⁶ Although the ABA opinion in the preceding paragraph does not address the situation in which the client wishes to exploit the error, this same trio of rules weighs in favor of a lawyer refusing to assist a client in misrepresenting the validity of a proposed clause. A tougher question is whether the same obligation exists when the clause is rendered invalid—perhaps on the basis of unconscionability or public policy¹³⁷—by a ruling in an unrelated case, after the contract is formed but before the other party performs on the clause to his or her detriment. If the drafting party's lawyer expressly or impliedly represented the validity of the

130. ABA Comm. On Prof'l Ethics and Grievances, Informal Op. 86-1518 (1986).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* Although the opinion uses Rule 4.1(b), determining the validity of a contract clause involves application of law to facts, not just failure to disclose a fact, so it is arguably instead governed by Rule 4.1(a).

136. See HAZARD & HODES, *supra* note 49, illus. 5-13, illus. 37-1, illus. 37-3.

137. This situation involves a clause invalidated by unconscionability or public policy, rather than by a new rule of law that is to be applied in a prospective fashion only.

clause during negotiations leading up to contract formation, the representation was not fraudulent or dishonest or a misrepresentation at that time. If the other party, however, reasonably relies on the drafting lawyer's original representation to its detriment by performing its obligations under the contract, some jurisdictions might hold this to be an implied continuing fraud or misrepresentation by the lawyer. It would also be dishonest conduct (allowing a client to take advantage of the clause's benefit to which it is not entitled), which Rule 8.4 forbids. If the other party were to discover the invalidity, it usually would be entitled to recover the benefit given to the drafting party based on the principles of unjust enrichment.¹³⁸

IV. CONCLUSION

The theme of this Symposium is how much lawyers can bend the boundaries of mandatory rules of law or even invade the heart of these mandatory rules, by "contracting out" of the UCC. This Article has examined the ethical pressures and proscriptions on lawyers in these situations and other situations where the clauses being drafted are of dubious or certain invalidity. Rules 1.2, 4.1, and 8.4 provide a powerful set of proscriptions against lawyers who intentionally draft or negotiate invalid clauses, fail to advise a client of an invalid or iffy clause, or misrepresent the validity of a clause to a client or another party or person. Rule 2.1 furnishes some compelling reasons why lawyers should counsel their clients more broadly than on legal considerations alone. These rules, however, do not prevent a lawyer from skillfully drafting a clause that is "close to the edge, but not over," as long as the lawyer has a good-faith argument as to the clause's validity, supported by a good-faith belief.

In many situations, a candid dialog between lawyer and client will resolve the ethical tension generated by an invalid or iffy clause, but in some situations, the lawyer has an obligation to disclose some facts to the other party, redraft the clause, or withdraw from representing the client. In other situations, the client's entitlement to zealous representation and client confidences takes precedence.

Lawyers tend to re-use and redraft contract language, both in standard-form agreements and in negotiated agreements. The resulting clauses tend to benefit their clients more and more, as the

138. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981) (Promise for Benefit Received).

clauses approach the bounds of validity and concurrently raise more of the ethical issues discussed in this Article. Some of the lawyers who draft iffy or invalid clauses are seeking to contract out of UCC rules, despite good arguments that some of those rules are mandatory or that the new clause attempts to disclaim "the obligations of good faith, diligence, reasonableness, and care."¹³⁹ This Article invites practicing lawyers, judges, and ethics scholars to look more closely at transactional ethics, in order to (1) enhance the legal profession's awareness of ethical pitfalls in "too-sharp" drafting practices, (2) bring ethics rules to bear on existing drafting practices that violate the rules, and (3) further develop transactional ethics into a more robust field that is better able to curb the ethical abuses in drafting and negotiation discussed in this Article.

139. U.C.C. § 1-302(b) (2003).

